IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.408 OF 1995

Sidharam Manikappa Nimbargi,
Age 21 years, R/o. Nilamnagar,
Majrewadi,
Solapur ...Appellant.

Versus

The State of Maharashtra ...Respondent

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Shri. M.K. Kocharekar, Advocate appointed for the appellant.

Shri. A.S. Shitole, A.P.P. for Respondent.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 15TH OCTOBER, 2004

ORAL JUDGMENT:-

1. Through this appeal, the appellant challenges the judgment and order dated 04.05.1995 passed by the learned Additional Sessions Judge, Solapur in Sessions Case No.25 of 1995. By the said judgment and order, the appellant came to be convicted under Section 452, 506(2) and 376 of I.P.C. For each of the offence the appellant was sentenced to R.I. for five years and to pay fine of Rs.500/- i/d R.I. for one month. The learned Sessions Judge further directed that all the substantive sentences were to run concurrently.

2. The prosecution case briefly stated is as under:-

. The prosecutrix P.W.3 Tangawwa Laxman Patil alongwith her husband P.W.9 Laxman Patil and their three children were residing in a one room tenement in Nilamnagar locality at Solapur. The appellant alongwith his brother was residing in front of the house of P.W.3 Tangawwa.

. The husband of P.W.3 Tangawwa was working in Shriniwas Mill. On 14.12.94 at about 11.00 p.m. P.W.9 Laxman left his house to go to work. He was working in third shift i.e. from 12.30 a.m. to 7.30 a.m. Tangawwa alongwith her three children were in the house i.e. eldest son Gurusidha aged about 6 years, second child Shivamma who was a daughter aged about 3 years and youngest son Hanmant aged about 2. At about 4.30 a.m. Gurusidha started weeping saying that he wanted to answer call of nature and hence, Tangawwa took out her son Gurusidha to the side of road to answer the call of nature. At that time the appellant came out from his house and enquired with Tangawwa as to why she woke up early in the morning and thereafter, he went away. After Gurusidha finished answering the call of nature, Tangawwa went with

him inside the house. She then chained the door. There was a chimney burning in the room. Tangawwa saw the appellant hiding himself below the cot. Gurusidha went to sleep. The accused then sat on the cot. Tangawwa then asked the accused to leave her house then the accused shut her mouth with his hand. The accused took out a Jambia from his other hand and threatened Tangawwa, hence Tangawwa kept mum. The accused then had intercourse with Tangawwa. Just when the accused was about to finish, P.W.9 Laxman, the husband of Tangawwa knocked the door with door chain and asked Tangawwa to open the door. The accused then hide himself below the cot, Tangawwa then unchained the door and weeping narrated the incident to her husband. Thereafter, her husband started beating her saying that she had taken so much time to open the door. Tangawwa showed her husband the accused who was hiding below the cot. Thereafter, her husband P.W.9 Laxman left her and pulled the accused from below the cot and started beating him. Her husband dragged the accused to the court yard of their house while beating the accused. However, the accused managed to run away.

. On hearing the commotion people gathered there, the persons who gathered advised them not to lodge the report. Thereupon Tangawwa told them that her

brother had gone to some place, after he returns she will take his advise and then decide. Her brother P.W.7 Kshadhakshari Desai came on the next day at 3.00 p.m., she then narrated the incident to her brother. After taking his advise the complaint of Tangawwa (Exh.20) came to be lodged. She was sent for medical examination. She produced her petticoat before the police. Underwear of the accused was also came to be seized during the investigation. After completion of investigation, charge sheet came to be filed.

3. In due course the case came to be committed to the Court of Sessions. The charge came to be framed against the appellant under Sections 452, 354, 506(2) and 376 of I.P.C. The appellant pleaded not guilty to the said charges and claimed to be tried. The defence of the appellant is that on account of enmity which arose on account of sale of his room, he has been falsely implicated in the present case.

4. During the trial, the prosecution has examined in all 10 witnesses. Out of the said witnesses, the star witness is P.W.3 Tangawwa Patil i.e. the prosecutrix. The learned Sessions Judge after going through the evidence adduced by the prosecution, convicted and sentenced the appellant

as stated in para-1 above. Hence, this appeal.

5. I have heard Shri. Kocharekar, the learned advocate appointed for the appellant as this appealis through jail. I have also heard Shri. Shitole, the learned A.P.P. for the respondent-State. I have also perused the entire material on record. After carefully considering all the material, I have reached the conclusion that this appeal deserves to be allowed.

6. The conviction of the appellant is mainly founded on the evidence of P.W.3 Tangawwa Patil and the evidence of P.W.9 Laxman Patil who is the husband of Tangawwa. Shri. Kocharekar, the learned advocate for the appellant has submitted that the facts of the case clearly shows that it was a case of consent.

7. It may be stated here that though articles i.e. petticoat of the prosecutrix Tangawwa and underwear of the appellant came to be seized and sent to C.A., no report of C.A. has been produced by the prosecution. Thus, one valuable link has been lost. After F.I.R. came to be lodged by Tangawwa she as well as the accused were sent for medical examination, no injuries were found on either prosecutrix or the accused. However, that fact by

itself is not conclusive that rape had not taken place.

8. It is the prosecution case that the accused was having Jambia with which he threatened the prosecutrix and hence she did not resist, in such case there would be no question of any injuries. However, it is pertinent to note that when P.W.9 Laxman i.e. the husband of prosecutrix returned home, the prosecutrix told him what transpired, whereupon her husband Laxman pulled the accused from below the cot and beat him. Thereafter Laxman dragged accused upto the court yard and continued to beat him. No Jambia was found with the appellant nor was any Jambia found in the house of the prosecutrix, nor any Jambia was recovered or seized in the present case. Even when Laxman beat the accused severely, in his defence the accused did not take out any Jambia nor during the scuffle of beating did any Jambia fall out nor any Jambia was seen or felt by Laxman. From all these circumstances, it appears doubtful that the accused was carrying a Jambia.

9. It has also come on record that the house of the prosecutrix is a small tenement of about 12’ X 8’. The house of the uncle of prosecutrix i.e. P.W.6 Sharnappa Desai was just behind the house of

the prosecutrix. There was a common wall between the two houses. The house of one Somling Gurudas was next to the house of prosecutrix. There was a common wall between the house of prosecutrix and the house of Somling. The house of Somling was a small tenement about 10' X 10'. The house of brother of prosecutrix i.e. P.W.7 Kshadhakshari Desai was on the back side of her house. There were other houses which were closely surrounding the house of the prosecutrix.

10. It is the case of the prosecution that as soon as she entered in the house after her son finished answering the call of nature, she chained the door of her house and was about to go to her cot, at that time accused came from below the cot. The accused then sat on the cot. She asked whether he would go out of her house or not. On hearing this the accused shut her mouth. Thereafter, the prosecutrix has also asked him as to why he came inside her house. The accused then pulled her on the ground near the cot. The accused took out a Jambia and threatened her and then proceeded to have intercourse with her. As stated earlier, the house of the prosecutrix was just 12' X 8'. Three of her children were sleeping in the said room. The houses of her brother and uncle were next door to her house. From the facts of this case as

discussed earlier it appears doubtful that the accused was armed with any weapon. If at all the prosecutrix wanted to resist she could have easily raised hue and cry and her relatives would have reached there within a few seconds. From all these facts there appears to be some merit in the submission made by the learned advocate for the appellant that the intercourse has taken place with the consent of the prosecutrix.

11. It is the further case of the prosecution that P.W.9 Laxman i.e. the husband of prosecutrix had gone to work in Sriniwas Mill. His shift was from 12.30 a.m. to 7.30 a.m. The time required for him to reach his place of work was one to one and half hours hence, he had left his house at about 11.00 p.m.. However, at about 4.30 a.m. on the date of incident he returned home and he knocked the door of the house. His wife did not open the door immediately. After opening the door, his wife told him that the accused had entered into the house and he had spoiled her. However, on hearing all this, her husband started to beat Tangawwa. In fact he beat Tangawwa so severely that there were contusions on her body. These contusions were noticed by P.W.4 Dr. Shah. P.W.4 Dr. Shah has stated that there was contusion on the back and hand of Tangawwa and that these contusions were

possible by wooden stick. It has been brought on record that P.W.9 Laxman who is the husband of Tangawwa beat her with stick. If in fact Tangawwa had been victim of rape then the husband would have adopted a sympathetic attitude towards her and he would have tried to pacify her. The very fact that Tangawwa's husband beat her severely with stick which is seen from the contusion marks over her body shows that he found fault with Tangawwa. As stated earlier the husband of Tangawwa had come home earlier than usual. On that day when he knocked the door, his wife did not immediately open the door and thereafter, she unchained the door and she narrated the incident to him. Thereafter, Laxman beat his wife Tangawwa which shows that he had suspicion in respect of Tangawwa and the accused.

12. It is also pertinent to note the evidence of P.W.10 A.P.I. Vasudev Joshi who was the investigating officer in the present case. He has deposed that he thought that Laxman would not support the prosecution case. This statement on the part of investigating officer also lends credence to the statement made on behalf of the defence and it was not a case of rape but it was an act of sexual intercourse by consent. From the facts of the case, it appears that when her husband

Laxman came home much earlier than usual and found the door was locked and Tangawwa took considerable amount of time to open the door. Tangawwa in order to protect herself, concocted a false story and informed her husband that accused had committed rape on her. Apparently her husband also did not swallow the false story put forth by Tangawwa. It is seen from the fact that he started beating her severely with a stick. Had it really been a case of rape, her husband would not have showed such a conduct and on the other hand he would have taken a sympathetic approach towards his wife. Looking to all these facts it does appear that it was a case of consent. In such case, the accused is entitled to the benefit of doubt.

13. In the result, this appeal is allowed. The conviction and sentence of the appellant for the offence under Sections 452, 506(2) and 376 of I.P.C. is set aside. The appellant is acquitted therein. Fine amount, if any, paid by the appellant, shall be refunded to him. The appellant is on bail, his bail bond shall stand cancelled.